UPREME COURT, U. S.

MAY 1 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1300.

BONITA M. TABOR, a Minor by LEWIS H. TABOR and BETTY W. TABOR, Her Parents and Natural Guardians, and LEWIS H. TABOR and BETTY W. TABOR, Individually and as Husband and Wife,

Respondents,

vs.

RICHARD F. MILLER and JOHN R. STEARNS and HERBERT BOARDMAN LORD, JR.

BRIEF FOR RESPONDENTS, BONITA M. TABOR, A MINOR BY LEWIS H. TABOR AND BETTY W. TABOR, HER PARENTS AND NATURAL GUARDIANS, AND LEWIS H. TABOR AND BETTY W. TABOR, INDIVIDUALLY AND AS HUSBAND AND WIFE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED BY JOHN R. STEARNS.

GORDON W. GERBER,
DECHERT, PRICE & RHOADS,
1600 Three Penn Center Plaza,
Philadelphia, Pa. 19102,
Attorneys for Respondents, Bonita M. Tabor, Lewis H. Tabor and Betty W. Tabor.

Of Counsel:
READ ROCAP, JR.,
ROCAP & ROCAP,
2nd & Jackson Streets,
Media, Pennsylvania.

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QUESTION INVOLVED.

Should this Court grant certiorari in a case where the courts below applied the Soldiers' & Sailors' Civil Relief Act of 1940 in a manner consistent with the standards established by this Court and those followed by other state and federal courts, and refused to postpone indefinitely the trial of a long-pending negligence case at the request of the insurance carrier for one of several defendants, a career Air Force officer in training in Alabama, because the courts below were convinced that the absence of the officer did not materially affect his defense and there was no evidence that he could not personally attend the trial in Pennsylvania?

STATEMENT OF THE CASE.

This diversity action, arising out of an automobile accident, was tried in Philadelphia, Pennsylvania before District Judge C. William Kraft, Jr., and a jury in January, 1967. The jury returned verdicts in favor of the three plaintiffs against the defendant Stearns, who was one of three defendants. The jury exonerated the other two defendants, Miller and Lord, from liability. The jury assessed damages at $22,000 for the wife-plaintiff, $7,600 for the husband-plaintiff, and $400 for the minor-plaintiff.

The accident involved in this suit occurred on June 9, 1961. The Complaint was filed on May 22, 1963. The litigation proceeded through more than three-and-one-half years of trial preparation. Although he was a career Air Force officer stationed in Dover, Delaware, at the time of the accident (142a-144a) and remained in the service continuously thereafter, defendant Stearns never asked for a special trial assignment. Philadelphia is his home and he had readily appeared with all the parties for discovery depositions in September, 1963 (156a). He also appeared so his own counsel could take his trial deposition in December, 1966.

The case appeared on the trial calendar, published during the summer of 1965, for the trial year September 1965 to June 1966. Defendant Stearns made no application for any special trial listing. The case was not reached.

The case appeared on the trial calendar, published during the summer of 1966, for the trial year September 1966 to June 1967. Defendant Stearns did nothing until the case reached the head of the list in the pool of cases ready for trial. Counsel for Stearns then appeared before the Calendar Judge, Judge Ralph C. Body, on November 23, 1966 to request an indefinite postponement. Judge Body refused to

postpone the trial indefinitely. Instead he granted a special listing of the case for trial during the week beginning Monday, January 9, 1967, in order to permit an opportunity for the defendant Stearns to make arrangements to come to Philadelphia, Pennsylvania, from Selma, Alabama, where, according to his counsel, he was in flight training (15a).

On December 8, 1966, counsel for defendant Stearns appeared before the Calendar Judge who was then Chief Judge Thomas J. Clary. Instead of having made arrangements for Stearns to appear at the specially set trial date in January, Stearns' counsel again asked for a continuance, this time until the "fall". This request was denied (21a). Before Chief Judge Clary, Stearns' counsel produced a letter, presumably signed by Captain Stearns, saying he was in flight training in Selma, Alabama, and his Commanding Officer thought it "highly desirable" to complete the training "uninterrupted". There was no suggestion that defendant Stearns (then Capt. Stearns) had applied for leave and been refused and no suggestion that he could not, in fact, attend a trial in Philadelphia even though it might mean missing a day of training. The letter produced by counsel did state, however, that Stearns would be in Philadelphia December 23 to December 28 and to let him know "what provisions are made" (19a)—quite obviously keeping open the question of his availability. Stearns' counsel made no request for a trial between December 23 and December 28 or on any other specific date.

Counsel for defendant Stearns thereafter, on December 27, 1966, in Philadelphia, took his client's deposition for use at trial. Significantly, Capt. Stearns again did not say he could not get leave to come from his flight training base in Alabama, to a trial in Pennsylvania.

The case then went on trial from January 12 to January 19, 1967. Defendant Stearns did not make a request to pre-

sent himself to the Court and jury for an evening or a week-end trial session during the week-long trial.

The evidence of the accident presented at the trial may be briefly summarized.

Lewis H. Tabor and his wife testified that he brought his automobile to a gradual stop in a line of traffic stopped at a traffic signal. After they had been stopped for a few seconds, they heard a loud crash from the rear which did not involve their car. There was then a second loud crash from the rear which did involve their car and which threw their car violently forward (206a-208a, 242a-243a).

Defendant Miller, who was driving the car behind the Tabors, was called for cross-examination by plaintiffs. He also came to a gradual and safe stop. He was thereafter struck from the rear (52a) and his automobile was thrown forward and hit the stopped Tabor car (56a).

Defendant Stearns was the driver of the third car in line. Plaintiffs read into evidence Stearns' trial deposition which had been taken by his own counsel. Stearns testified that he was driving about 30 miles an hour and saw the Miller car some 300 feet in front of him. Stearns observed when he was still some 200 feet from the Miller car, that it was stopped (156a). Nevertheless, he continued forward that 200 feet and struck the rear of the Miller car while his own car was still moving at a speed of about 20 miles per hour (165a).[1]

Defendant Lord, the driver of the fourth car in line, was called by plaintiffs for cross-examination. He didn't know anything about the movements or operation of the Tabor and Miller cars. After the Stearns' car hit the Miller car, Lord hit the rear of Stearns while his own car was going

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[1] This testimony given to his own counsel, was consistent with the sworn deposition testimony he had given when all the parties gave discovery depositions in Philadelphia in September 1963.

3 to 5 miles per hour. That collision did not involve the Tabor car (180a-183a).[2]

Stearns' counsel read into evidence the deposition of a passenger in the Stearns' car, Capt. Ronald Lane. Lane said that the Stearns' car was moving about 30 miles per hour and was within 150 feet of the Miller car before the brakes were applied (276a, 286a-287a). He testified that the Stearns' car was moving 20 to 25 miles per hour when it struck the rear of the Miller car (277a-278a, 282a).

The jury concluded that the accident was caused by the negligence of defendant Stearns whose motion for a new trial, based on a variety of reasons, was denied by the District Court. Stearns appealed. The Court of Appeals, Judges McLaughlin, Freedman and Seitz, affirmed the judgment of the District Court. Defendant Stearns now petitions for certiorari.

ARGUMENT.

Petitioner argues that certiorari should be granted on the alleged ground that the Courts below have decided this case "contrary to the trend of earlier decisions of other federal and state courts" (Pet. 7) in applying the Soldiers' & Sailors' Civil Relief Act of 1940: Act of October 17, 1940, C. 888, §201, 54 Stat. 1181, 50 App. U. S. C. §521. Even if there were such a "trend" that would not be a "conflict of decisions" as contemplated by this Court's Rule 19. However, the present case is not contrary to earlier decisions.

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[2] Contrary to the suggestion in the Petition (p. 5), Upper Darby Township police officer Celia, called as a witness by defendant Stearns, had no first-hand knowledge and no personal recollections of the accident or events (220a).

Indeed, the present decision is authorized by the statute and supported by the earlier cases.

Under the Soldiers' & Sailors' Civil Relief Act an action in which a person in military service is involved is to be stayed "unless, in the opinion of the Court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."[3] Since this Court's decision in *Boone v. Lightner*, 319 U. S. 561 (1943), the cases have uniformly applied this Court's ruling that a Trial Court may properly exercise its discretion to conclude that a case should not be deferred simply because a party is in the Armed Service. The exercise of discretion in favor of an applicant must be justified by some genuine explanation, on the record, of (1) the inability of the party to appear at the trial and (2) the material, adverse effect of his absence.

Among the cases refusing postponements are: *Runge v. Fleming*, 181 F. Supp. 224 (D. C. Iowa 1960) (act should not be used as an instrument for oppression of opposing parties); *Womack v. Berry*, 291 S. W. 2d 677 (Tex. 1956) (act should not be used as a device to delay proper and expeditious determinations of legal proceedings); *Lindsey v. Williams*, 260 S. W. 2d 472 (Mo. 1953), cert. denied, 347 U. S. 904 (defendant's testimony obtained by deposition and he was covered by insurance); *Graves v. Bednar*, 95 N. W. 2d 123 (Neb. 1959) (defendant had been in and out

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[3] The Act provides:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501-548 and 560-590 of this Appendix], **unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.**" (Emphasis added.)

of jurisdiction while case was pending and took no action to have case set for trial); *Mayfair Sales, Inc. v. Sams,* 169 So. 2d 150 (La. App. 1964) (person in military service not entitled to automatic stay of proceedings, he must show definitely where his rights would be prejudiced by the suit going to trial); *Culver v. Superior Court In And For Los Angeles County,* 270 P. 2d 78 (Cal. App. 1954) (where soldier's testimony could have been obtained with reasonable diligence, refusal of continuance to soldier was not error).

In exercising the discretion granted to it, the trial court in the present case concluded that petitioner's absence did not materially affect his defense. Moreover, the trial court was not satisfied that petitioner was, in fact, not able to appear personally at the trial.

The conclusions of the lower court in this case were not only justified, they were virtually inescapable.

It is apparent that a finding that defendant Stearns was not prevented from attending the trial of this case had he and his counsel wanted him present was amply justified. During the more than three-and-one-half years the case awaited a trial assignment in Philadelphia, Stearns never asked for a special trial listing although he was at all times stationed in the United States and periodically was in Philadelphia, his home. On the eve of trial, Stearns was granted a special trial date more than a month off. Stearns then came to Philadelphia where his own counsel took his trial deposition but did not ask for a trial. Neither Stearns nor anyone else suggested that Stearns had applied for leave to attend the trial, that such leave had been refused or that it was not possible for him to attend the trial. During the course of the trial itself neither Stearns nor his counsel requested a weekend or evening session to enable Stearns to come to Philadelphia, Pennsylvania and testify.

Secondly, a finding that there was no material, adverse effect on Stearns' defense flowing from his absence was also more than justified. Stearns' testimony was taken twice in depositions—the second time by his own counsel. It was plaintiffs, not defendant Stearns, who then sought to call defendant Stearns as a witness at the trial. And when plaintiffs presented the testimony of Captain Stearns, they used the deposition taken by his own counsel. As a matter of fact, the description of the accident given by Captain Stearns and his passenger convicted Stearns of negligence.[4] It could hardly be seriously suggested that Stearns' appearance at trial to change his testimony from his two sworn depositions would have helped his cause. On this aspect, the trial judge specifically stated (Pet. 16): "We are wholly unpersuaded that the conduct of this defendant's defense was materially affected by his absence."

Petitioner suggests that a "new claim" arose during the course of trial and this Court should determine whether that materially affected his defense. Petitioner fails to state that the new issue was a medical issue about which the petitioner would have no knowledge (i.e., a claim that the wife-plaintiff was "mentally ill" and not physically hurt). Defendant Stearns also fails to mention that it was his counsel who injected the "new issue" into the trial. In the opinion of the trial judge, he noted (Pet. 20): "Though plaintiffs' counsel did not claim mental illness or inject that issue into the case, the issue was raised and litigated by the defendant's forceful, unrelenting interrogation on this subject." This Court said, in *Boone v. Lightner,* that it is for lower courts to resolve questions of whether a so called

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[4] Stearns saw Miller stopped in front of him when 200 feet away. Nevertheless, he slowed only from about 30 miles per hour to about 20 miles per hour during that 200 feet before the impact.

"new claim" materially affected a defense. The Courts below resolved that question in this case, and, it is submitted, correctly.

Petitioner suggests that certiorari should be granted because the amount of the recovery exceeded the amount of the liability insurance policy of defendant Stearns. The record is silent on the subject of the amount of Stearns' liability coverage so respondent is not able to reply to this argument on a factual basis. However, it should be noted that this argument is a reversal of Stearns' position prior to his present petition. Throughout the arguments in the District Court and Court of Appeals defendant Stearns maintained steadfastly that the existence of insurance coverage was irrelevant to the question of whether he should be granted a postponement. It was in disagreeing with this argument that the trial judge pointed out that the real party in interest and the party financially liable is the liability insurance carrier which had refused plaintiffs' offers to settle within the limits of the carrier's policy both before and during the trial (Pet. 14-15). The trial court's observation was consistent with *Boone v. Lightner* where this Court said that insurance coverage may be a factor to be considered by lower courts and may be a factor suggesting that a postponement should not be granted because the real party in interest is the insurance carrier rather than its insured. However, the existence of insurance coverage is, as this Court has clearly held, simply one of the circumstances to be entrusted to the consideration and discretion of trial courts. One thing appears certain. Petitioner's suggested rule would be an odd one: go to trial and if the plaintiff

loses or gets a small verdict, let the results stand; otherwise give the insurance carrier a second try.[5]

CONCLUSION.

This Court has held that trial courts have the responsibility for determining the factual question of whether a service man is genuinely unavailable to attend a trial and whether his absence would materially affect (or has materially affected) his defense. The rule is a sound one and was applied in the present case, with understanding, by the trial court. A unanimous Court of Appeals agreed and affirmed the trial court's decision.

It is respectfully suggested that the present case involves no conflict of decisions and no question or issue justifying review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GORDON W. GERBER,
Attorney for Respondents,
Bonita M. Tabor, Lewis H. Tabor and Betty W. Tabor.

Of Counsel:
READ ROCAP, JR.,
ROCAP & ROCAP.

April, 1968.

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[5] After the trial, Stearns' counsel suggested to the District Court and plaintiffs' counsel that the verdicts were greater than Stearns' coverage (Pet. 15), and the trial court noted that it was Stearns' carrier which refused to accept plaintiffs' offers to settle within the limits of coverage both before and during the trial (Pet. 15). Its counsel also declined plaintiffs' offer, after trial, to satisfy the judgments upon payment of the amounts which the court might determine were the limits of the carrier's coverage. It is now and always has been the insurance company which has defended and negotiated this case (Pet. 14-15). It will be that company, not Stearns, who will have to pay the judgments: see **Gray v. Nationwide Mutual Ins. Co.**, 422 Pa. 500 (1966).